82-1364

Office-Supreme Court, U.S.
FILED
FEB 14 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

AQUATIC TECHNICAL SERVICES, INC.,
Petitioner,

v.

COUNTY OF NASSAU, NASSAU
COUNTY POLICE DEPARTMENT,
SAMUEL ROZZI, Commissioner
of Police, and FRANCIS T.
PURCELL, County Executive,
Respondents.

WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

Carl C. Banno
Banno, Landis & Pajion
146 Old Country Road
Mineola, New York 11501
516/746-5100

Counsel of Record
for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Are towing operations conducted by marine police officers in non-emergency situations performed in excess of valid police powers?

II. Do these towing operations infringe upon a private salvor's constitutionally protected liberty and property interests?

III. Does marine police officer's unwarranted questioning of a private salvor in front of potential customers infringe the salvor's constitutionally protected liberty and property interests in his good name and reputation when these actions result in loss of business to the salvor?

LIST OF PARTIES

In addition to those parties listed in the caption of this case, ROBERT S. RICKARD, sole stockholder and president of Aquatic Technical Services, Inc., was made a plaintiff by the trial court and is a petitioner in the present action.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW . . .	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED .	2
STATEMENT OF THE CASE	2
ARGUMENT:	
I. THE MARINE POLICE'S TOWING OF VESSELS IN NON-EMERGENCY SITUATIONS IS PERFORMED IN EXCESS OF ITS VALID POLICE POWERS . .	14
II. THE MARINE POLICE'S TOWING INFRINGES UPON RICKARD'S CONSTITUTIONALLY PROTECTED RIGHTS	24
A. The Towing Operations Serve to Deny Rickard's Liberty and Property Interests in Pursuing a Career	24

TABLE OF CONTENTS, Continued

Page

B. The Towing Operations Serve to Deny Rickard's Property Interest in His Towing license 34

III. THE MARINE POLICE'S ACTIONS IN DAMAGING RICKARD'S GOOD NAME AND BUSINESS REPUTATION HAVE VIOLATED HIS LIBERTY AND PROPERTY INTERESTS IN THAT NAME AND REPUTATION 36

CONCLUSION 39

CERTIFICATE OF SERVICE 40

APPENDIX A-1

TABLE OF AUTHORITIES

Cases: Page

Barsky v. Board of Regents of University of State of New York, 347 U.S. 442 (1954) 25

Barry v. Barchi, 443 U.S. 55 (1979) 34

Catrone v. Massachusetts State Racing Commission, 404 F. Supp. 765 (D. Mass. 1975), vacated on other grounds, 535 F.2d 669 (1st Cir. 1976) 28, 38

City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 23

Gilmour v. New York State Racing & Wagering Board, 405 F. Supp. 458 (S.D.N.Y. 1975) 28, 38

Goldblatt v. Town of Hempstead, New York, 369 U.S. 590 (1962) . . 17

Greene v. McElroy, 360 U.S. 474 (1959) 27

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 27

Hanson v. Unified School District No. 500, Wyandotte County, Kansas, 364 F. Supp. 330 (D. Kan. 1973) 28

TABLE OF AUTHORITIES, Continued

Cases, Continued — Page

Keker v. Procunier, 398 F. Supp. 756 (E.D. Cal. 1975) 28, 32

LaBauve v. Louisiana Wildlife & Fisheries Commission, 444 F. Supp. 1370 (E.D. La. 1978). . . 30, 35

Lemberos v. Laurel Racecourse, 489 F. Supp. 1376 (D. Md. 1980) 35

Lewis v. City of Grand Rapids, 222 F. Supp. 349 (W.D. Mich. 1963), rev'd in part on other grounds, 356 F.2d 276 (6th Cir.), cert. denied, 358 U.S. 838 (1966) . . . 28

Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169 (9th Cir.), cert. denied, 375 U.S. 829 (1963) 28, 35

Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied sub nom. Rashkind v. Marrero, 450 U.S. 913 (1981) . . . 37

McKnight v. Southeastern Pennsylvania Transportation Authority, 583 F.2d 1229 (3d Cir. 1978) . . . 38

Ohio v. Helvering, 292 U.S. 360 (1934) 16

Patch Enterprises v. McCall, 447 F. Supp. 1075 (M.D. Fla. 1978) 22

TABLE OF AUTHORITIES, continued

Cases, Continued — Page

Paul v. Davis, 424 U.S. 693 (1976) 36, 37

Price v. Block, 535 F. Supp. 1239 (E.D.N.C.), aff'd without opinion, 685 F.2d 431 (4th Cir. 1982) 28, 32

Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980) 38

Rochester Telephone Corp. v. Village of Fairport, 84 A.D. 2d 455, 446 N.Y.S.2d 823 (1982) 19

Ruff v. Marshall, 438 F. Supp. 303 (M.D. Ga. 1977) 22

Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980) 21

Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957) 27

Shaw v. Hospital Authority of Cobb County, 507 F.2d 625 (5th Cir. 1975) 28

Truax v. Raich, 239 U.S. 33 (1915) 26

United States v. Robel, 389 U.S. 258 (1967) 27

TABLE OF AUTHORITIES, Continued

Cases, Continued — Page

Willens v. University of Massachusetts, 570 F.2d 403 (1st Cir. 1978) 39

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 37

Other Authorities:

Sax, "Takings and the Police Power," 74 Yale L.J. 36 (1964) 21

OPINIONS BELOW

The judgment of the Supreme Court of New York, Trial Term, dated September 15, 1981, is unreported and is set out in the Appendix at pp. A-3 to A-5. The opinion of that same court, dated August 10, 1981, is also unreported and is set out in the Appendix at pp. A-6 to A-24. The order of the Appellate Division of the Supreme Court of New York, dated August 2, 1982, is also unreported and is set out in the Appendix at pp. A-25 to A-26. The order of the Court of Appeals of New York, dated November 16, 1982, is also unreported and is set out in the Appendix at pp. A-27 to A-28.

JURISDICTION

The order of the Court of Appeals of New York dismissing the appeal from the Appellate Division was entered on November 16, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause of the fourteenth amendment to the United States Constitution provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The legal bases of this appeal are two: (1) that officers of the Nassau County (New York) Marine Bureau (hereinafter, "the marine police") denied Aquatic Technical Services, Inc. (hereinafter, "Aquatic")

and its president, Robert S. Rickard (Aquatic and Rickard often will be jointly referred to hereinafter as "Rickard"), liberty and property interests in the right to make a living, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution, and (2) that the marine police took steps to actively rob Rickard of his liberty interest in his good name and business reputation, as guaranteed by the due process clause of the fourteenth amendment to the United States Constitution. These issues were first raised in paragraph 30 of Rickard's verified complaint, dated July 14, 1978, where Rickard charged:

> The actions and policies of the defendant Nassau County Police Marine Bureau are without authority because they constitute the taking of private property without just compensation, contrary

to Article I, Section 6, of the Constitution of the State of New York, and the Fourteenth Amendment to the Constitution of the United States.

The trial court held, essentially, that Rickard "did not demonstrate a right or privilege in the property" of his towing service. (A-18) The Appellate Division affirmed for this reason (A-25), and the Court of Appeals found that "no substantial constitutional question is directly involved." (A-28)

The facts of this case are not in dispute. Rickard is president and the sole stockholder of Aquatic, which was incorporated in 1962. Aquatic is a company that performs marine towing and salvage and related functions and is located in Nassau County, New York. Rickard started Aquatic as a full-time business while he was employed elsewhere and initially directed the business only

at the salvaging of larger ships. When Aquatic performed only this type of service, no problems existed between Aquatic and the marine police.

The marine police were established in 1938 but had their first large fleet of boats built in 1950. At the time this action was heard, the marine police had a manpower force of 64. They had 16 boats, including four 17-foot whalers, three 20-foot boats, two 31-foot Pacemakers, six 32-foot custom-built boats, at least one of which has a central towing rig as well as standard towing rigs typical of other boats, and a 45-foot steel boat. The marine police broke their duties down into two types: (1) enforcement, by which the police mean enforcement of maritime laws, and (2) patrol, which is a broader category combining enforcement with towing of boats.

With regard to the marine police's towing efforts, one former commanding officer of the marine police told Rickard during the time period involved in this action that the police policy "was to do what they wanted to, with whom they wanted to, where they wanted to, and when they wanted to do it."

Nassau County and the bay on which Rickard lives entertain a large number of pleasure craft, particularly during the summer months. Because of this, after Rickard left his previous job he expanded the towing services of Aquatic beginning in approximately 1976 to include all types of towing, including smaller boats. In approximately 1970, he had received a license from the Coast Guard to operate a towing and salvage service. This license was obtained after taking and passing an examination. Rickard's problems with the marine police

began at the time he expanded his towing service to include smaller craft.

The marine police have conceded that their policy is to tow pleasure craft at any time and for any reason from the point at which aid is requested to a "safe harbor," which the deputy commanding officer of the marine police defines as a point of safety containing a safe mooring, a telephone, gasoline, and shelter. This is one point of contention in the present case. Rickard claims that the marine police are not empowered to tow pleasure craft that are not in emergency situations. In towing pleasure craft not in emergency situations, the marine police are acting without authority in an ultra vires capacity and thus depriving Rickard of his right to pursue the career of his choice. The marine police, however, contend that they have the authority to "operate in situations

in addition to emergencies," according to the stipulation of Joseph Carney, Assistant County Attorney.

Also uncontested is the vast disparity in the number of tows that the marine police and Rickard make respectively during a given year. The marine police concede that they respond to approximately 1,700 calls for assistance during a typical year. These calls are for towing or similar assistance; they do not include calls for more typical police assistance such as investigation, responding to reports of a crime, and the like. Of these calls, the marine police take some action in every one where a boat is still present at the time it arrives on the scene. In the words of the deputy commanding officer, the marine police are "not in the habit of" and will not call commercial salvors. Response to these calls is free in the

sense that individual charges are not made for the services rendered but, instead, the costs are absorbed by the marine police budget and spread throughout the residents of the county.

On the other hand, Rickard typically receives five or six towing jobs per year from initial places where some disabling problem has occurred and twenty to thirty towing jobs per year from safe harbors. (This is in addition to his towing of larger vessels to which the marine police do not respond.) Because he is in a business, Rickard must charge for his service on an individual basis. He contends that the marine police's operation in situations that are not emergencies has served to deprive him of his liberty and property interest in pursuing a career.

In addition to the concessions made by the marine police, however,

Rickard at trial outlined several incidents where the marine police operated outside the guidelines that they have adopted. In one incident, the marine police towed a boat from a safe harbor to which it had been taken by the Coast Guard to an individual's home. Because of this unauthorized towing, the marine police were unable to respond to reports of a disturbance caused by speeders in boats. Rickard has also testified to an incident where the marine police have towed a sailboat past a safe harbor at a Coast Guard station to some further point. The marine police have also been involved in incidents of towing boats from points outside to points inside the county line, which marks their jurisdictional boundary. The marine police also have interfered with Coast Guard assistance on several occasions. One example was in September 1977 when the police

intercepted a response for help sent to the Coast Guard, were told by the Coast Guard not to help, and interfered with an unsuccessful attempt to tow a grounded boat. That this type of interference affects Rickard is shown by an incident in January 1979 where the Coast Guard suggested that a grounded vessel seek commercial assistance but the marine police nevertheless unsuccessfully attempted to tow the boat.

These incidents all occurred outside the scope of what the marine police claim to be their powers. They further serve to deprive Rickard of his liberty and property interests in pursuing a career. As Rickard has noted, whenever the occupants of a distressed vessel had the option of paying for his service or awaiting free marine police service, they inevitably would wait for the marine police service.

One other series of events serves to show the marine police's interference with Rickard's liberty and property interest. Often he would be in the middle of negotiating a price for his services with the occupants of a stranded vessel and the police would arrive on the scene and begin towing operations. Rickard thus was faced with the choice either of relinquishing the tow to the police or insisting that they leave the scene and causing ill will for his business.

Finally, in a series of incidents the marine police have operated in such a manner that Rickard's good name and reputation have been damaged. In June 1981 Rickard and the marine police arrived at the site of a stranded vessel at about the same time. The police insisted that Rickard's boat was not registered and Rickard insisted that it was.

The marine police gave him a citation and took the tow. This citation subsequently was dismissed in court. Virtually the same event, again in front of a potential customer, was played out the next day. As Rickard has noted, this type of questioning occurs only in front of potential customers, never at his dock, which the marine police pass several times daily. This questioning also destroys Rickard's opportunity to do business with the potential customers. This challenge to Rickard's professional credentials results in a deprivation of his liberty interest in his good name and reputation.

The Supreme Court, trial term, ruled against Rickard's due process arguments (A-18 to A-19), the Appellate Division affirmed (A-25 to A-26), and the Court of Appeals of New York dismissed Rickard's

appeal. (A-27 to A-28) The present Petition for Writ of Certiorari was timely filed.

ARGUMENT

I. THE MARINE POLICE'S TOWING OF VESSELS IN NON-EMERGENCY SITUATIONS IS PERFORMED IN EXCESS OF ITS VALID POLICE POWERS.

In the present case, Rickard does not contend that the marine police never may tow stranded or incapacitated private boats. Rickard contends, however, that the marine police only have authority to act in emergency situations. All actions taken by the marine police outside the scope of an emergency are ultra vires, and to the extent that they serve to interfere with Rickard's ability to pursue his career, they infringe upon his liberty and property interests under the due process clause of the fourteenth amendment.

The fourteenth amendment by its own terms applies only to state action. Still, no doubt exists in the present case that the marine police are acting within the scope of state action. The police officials are state officers and employees, their equipment is purchased with state funds, many of the tows to which Rickard objects are made in accordance with written marine police policies, the marine police have admitted that they have a policy of towing any vessel to a safe harbor for any reason, and the tows that are made outside the limits of the written police guidelines are so numerous as to amount to a policy on the part of the marine police. Nevertheless, the actions of which Rickard complains are not taken in accordance with the accepted definition of "police power" and thus constitute invalid, ultra vires activities.

This Court has noted that limits exist to police powers when the State attempts to extend those powers into areas of ordinary commercial enterprise. "[T]he police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on." Ohio v. Helvering, 292 U.S. 360, 369 (1934) (the Federal Government may tax a state when it engages in the business of selling liquor). The State may engage in ordinary commercial ventures, "but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power." Id. Rickard submits that the marine police can show no authority vested in them aside from their police powers that would authorize their venture into the business

of commercial towing, and that the State's police power alone is not enough to authorize this venture. For that reason, the actions of the marine police are ultra vires.

This Court has also recognized that the exercise of police power is limited to situations where (1) the interests of the public require interference by the State, and (2) the means chosen by the State are reasonable and not oppressive. Goldblatt v. Town of Hempstead, New York, 369 U.S. 590, 594-95 (1962) (upholding ordinance regulating dredging and pit evacuation within town borders). Rickard submits that the marine police's commercial towing ventures fail both prongs of the Goldblatt test. First, the marine police can show no public interest. The marine police's towing operations are aimed at only a small

percentage of the population of Nassau County, those capable of affording a pleasure boat and the costs involved in operating it. Yet, because no charges are made on an individual basis for the tows, the cost must be spread among all residents of the county. Second, the method of operation chosen by the marine police is excessively oppressive. If the police responded only in emergencies, this action would be within the scope of their power. By responding to and acting upon all calls for assistance, whether emergency or not, the marine police have acted in an oppressive manner that robs Rickard of his right to earn a living.

What is and is not an emergency that the marine police should act upon was defined at the trial below by a competitor of Rickard when he defined the meaning of the international maritime

distress signal, "mayday." Mayday properly refers only to "the immediate loss of life and property -- the vessel, the safety of the vessel and the safety of the balance of the passengers on board. It's a serious one." If the marine police were to follow this internationally accepted meaning of the term "emergency," Rickard would have no complaint. Instead, the police operate to tow any vessel for any reason. This action is outside the scope of the State's police power.

Courts in New York have recognized limitations upon the State's police power similar to those recognized by this Court. In Rochester Telephone Corp. v. Village of Fairport, 84 A.D.2d 455, 446 N.Y.S.2d 823, 825 (1982), the court stated that "[t]he general police power must always be exercised within the limits of 'public necessity'." (Village could not require

telephone corporation to relocate transmission facilities underground at its own expense as part of a reconstruction program.) In so stating, the court recognized the rule outlined by one leading commentator:

> [W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

Sax, "Takings and the Police Power," 74 Yale L.J. 36, 67 (1964), quoted at 446 N.Y.S.2d at 825. No public necessity for the marine police actions exists because the actions affect too small a segment of the population. In addition, the actions of the marine police tend to drive Rickard and others out of business.

Other courts have recognized similar principles. The court in Sawyer v. Sandstrom, 615 F.2d 311, 315 (5th Cir. 1980) (ordinance prohibiting association with persons known to possess or use dangerous drugs or narcotics is invalid), stated that actions taken under the police power cannot "sweep so broadly as to infringe upon the constitutional and organic rights of an individual." Activities subject to regulation cannot be affected by invading protected freedoms. Id. As will be shown, Rickard has a protected interest in pursuing his occupation, and this

interest is infringed by the unauthorized exercise of power by the marine police.

Similarly, the court in Patch Enterprises v. McCall, 447 F. Supp. 1075 (M.D. Fla. 1978) (upholding county ordinance prohibiting "bottle clubs"), recognized three criteria of valid police power. First, more than a limited number of persons must benefit from its exercise; second, it must not unreasonably restrict guaranteed rights; and third, it must be impartial and non-discriminatory. Id. at 1081. The marine police's activities benefit only a limited number of persons, they restrict Rickard's liberty and property rights, and they are discriminatory for both of these reasons.

The marine police's activities also would fail the test establsished by the court in Ruff v. Marshall, 438 F. Supp. 303 (M.D. Ga. 1977) (invalidating

city curfew and loitering ordinances). This is so because the marine police cannot show either (1) a significant reason to support their actions, or (2) that the actions are tailored to meet specific needs without unnecessarily infringing upon guaranteed individual rights. See id. at 306.

This Court has recognized "the impact which local governments, acting as providers of services, may have on other individuals and business enterprises . . . ." City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389, 403 (1978). The marine police should not be permitted to continue to provide such an impact upon Rickard's business through the unlawful exercise of its police powers.

II. THE MARINE POLICE'S TOWING INFRINGES UPON RICKARD'S CONSTITUTIONALLY PROTECTED RIGHTS.

A. The Towing Operations Serve to Deny Rickard's Liberty and Property Interests in Pursuing a Career.

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the

> opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

Barsky v. Board of Regents of University of State of New York, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting) (Court upholds doctor's suspension from practice because of conviction resulting in failure to produce documents for House Activities Committee).

Many courts, with this Court among them, have continually recognized that among the rights accorded protection by the liberty and property guarantees of the fifth and fourteenth amendments is the right to pursue the occupation of one's choice. Justice Douglas's words in Barsky are merely the strongest statement of that principle. Although it is true, as recognized in Barsky, id. at 451, that

the Government can place reasonable restrictions on the pursuit of an occupation, it is clear that the Government cannot totally restrict one's practice of an occupation. Yet the actions of the marine police in the present case are having just that effect upon Rickard.

The decisions recognizing a liberty or property interest in pursuing an occupation all have their roots in this Court's decision of Truax v. Raich, 239 U.S. 33 (1915). There, this Court stated that a right exists to earn a livelihood and to continue in employment unmolested by invalid actions of the Government. Id. at 38. The ultra vires actions of the marine police in the present case are precisely the type of invalid Government actions invalidated in Truax.

Such an acknowledgment has been recognized consistently by this Court.

In Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 238-39 (1957), this Court stated: "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Liberty or property interests in holding specific employment and following one's chosen profession free from unreasonable Government interference have been recognized in Greene v. McElroy, 360 U.S. 474, 492 (1959) (revocation of security clearance leading to loss of job with private firm). Accord Hampton v. Mow Sun Wong, 426 U.S. 88, 100-02 (1976) (liberty interest in civil service employment); United States v. Robel, 389 U.S. 258, 265 n.11 (1967).

Liberty and property interests in employment and pursuit of one's occupation have been acknowledged by

numerous courts. See, e.g., Shaw v. Hospital Authority of Cobb County, 507 F.2d 625, 628 (5th Cir. 1975); Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169, 174 (9th Cir.), cert. denied, 375 U.S. 829 (1963); Price v. Block, 535 F. Supp. 1239, 1246 (E.D.N.C.), aff'd without opinion, 685 F.2d 431 (4th Cir. 1982); Gilmour v. New York State Racing & Wagering Board, 405 F. Supp. 458, 459-60 (S.D.N.Y. 1975); Catrone v. Massachusetts State Racing Commission, 404 F. Supp. 765, 770 (D. Mass. 1975), vacated on other grounds, 535 F.2d 669 (1st Cir. 1976); Keker v. Procunier, 398 F. Supp. 756, 760-63 (E.D. Cal. 1975); Hanson v. Unified School District No. 500, Wyandotte County, Kansas, 364 F. Supp. 330, 332 (D. Kan. 1973); Lewis v. City of Grand Rapids, 222 F. Supp. 349 (W.D. Mich. 1963), rev'd

in part on other grounds, 356 F.2d 276 (6th Cir.), cert. denied, 358 U.S. 838 (1966).

In the present case, the marine police have acted outside the authority granted to them under the police powers of the State. In so doing, they have destroyed any opportunity that Rickard would have to make a living in his chosen career as a marine salvor. This is indicated by the number of towing operations of pleasure craft performed by the marine police and Rickard respectively. The marine police respond to approximately 1700 calls per year; Rickard handles five or six calls for initial tows per year of the type of police would handle and another twenty to thirty jobs from safe harbor locations. Yet Rickard has invested time and money in building up his business since it was incorporated in

1962. He has invested in equipment necessary for the operation of his business, only to find his efforts at successful commercial operation of the business thwarted by the marine police.

Such a situation occurred in LaBauve v. Louisiana Wildlife & Fisheries Commission, 444 F. Supp. 1370 (E.D. La. 1978). There, fishermen challenged under the due process clause regulations placed on commercial fishermen by the state, based partially on a $14,000 investment by the fishermen in nets and other equipment. The court stated:

> [W]e conclude that even though the state has proprietary and regulatory interests in wildlife, plaintiff's interests in exercising his fishing license and using his paraphernalia constitute legitimate claims of entitlement within the ambit of "property

rights" under the Due Process Clause of the Fourteenth Amendment.

Our conclusion that the right to pursue an occupation is a legitimate entitlement within the protective purview of the Due Process Clause is further bolstered by Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915), where the court expressly held:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

Hence, we conclude that plaintiff is entitled to due process of law before

> his interests here at stake can be deprived.

Id. at 1378-79. (The court subsequently concluded that the fishermen had received all of the process that was due them.)

Similarly, the court in Price v. Block, supra, 535 F. Supp. at 1246, concluded that farmers who grew tobacco had a liberty interest in continuing to grow the tobacco. The sole reason the court in Price concluded that the farmers' liberty interests were not taken was that they could continue to grow other types of tobacco. Id. The same cannot be said of Rickard's maritime towing operations.

The court in Keker v. Procunier, supra, 398 F. Supp. at 761, recognized that the right to engage in a given profession was impliedly the right to practice according to the highest standards of that profession. This right has not been accorded Rickard. He has been harassed by

the marine police to the extent that towing jobs he has been in the process of negotiating have been taken from him. Thus, he has been unable to perform in accordance with the highest standards of his profession.

As mentioned previously, Rickard does not contest the valid exercise of police powers by the marine police in emergency situations, as typified by the universal meaning of the international distress signal, "mayday." Instead, Rickard contends that the ultra vires usurpation of non-emergency towing and rescue jobs has served to deny him his protected liberty and property interests in his occupation. This Court should hold that the marine police should not continue to mount such an unconstitutional deprivation of substantive due process rights.

B. The Towing Operations Serve to Deny Rickard's Property Interest in his Towing License.

In approximately 1970 Rickard received a license from the Coast Guard to engage in towing and salvage operations. Thus, for many of the same reasons recognized in the argument above, the actions of the marine police have served to take away the property interest that Rickard has in this license. The effect of the marine police's actions is that the license is, too a large extent, worthless to Rickard.

This Court has recognized that a property interest can exist in such a license. See Barry v. Barchi, 443 U.S. 55, 64 n.11 (1979) (property interest in "clear expectation of continued enjoyment of a license absent proof of culpable conduct"). Other courts similarly have recognized a property interest in a license.

See Lemberos v. Laurel Racecourse, 489 F. Supp. 1376, 1387 (D. Md. 1980) (license that can only be revoked for cause); LaBauve v. Louisiana Wildlife & Fisheries Commission, supra, 444 F. Supp. at 1378-79 (state license as a commercial fisherman). Property interests in similar state-granted benefits also have been recognized. See Maison v. Confederated Tribes of Umatilla Indian Reservation, supra, 314 F.2d at 174 (treaty restrictions serve to give Indians different fishing interests than are given to other citizens).

For precisely the same reasons as were stated in the previous argument, Rickard's property interest in his towing license cannot be taken unilaterally by the marine police. Yet, obviously, that is the effect of the marine police actions. Rickard is no longer able to use his license to engage in the profession he has chosen. The license is virtually

useless to him, and this uselessness is attributable directly to the ultra vires actions of the marine police. This Court should not permit such a situation to continue.

III. THE MARINE POLICE'S ACTIONS IN DAMAGING RICKARD'S GOOD NAME AND BUSINESS REPUTATION HAVE VIOLATED HIS LIBERTY AND PROPERTY INTERESTS IN THAT NAME AND REPUTATION.

This Court has recognized that defamation by government officials, standing alone, does not violate constitutionally guaranteed freedoms. Paul v. Davis, 424 U.S. 693 (1976). In the present case, however, Rickard has testified to more than defamatory statements on behalf of the marine police. He has shown that the marine police questioned the legitimacy of his boat's registration in front of potential customers but never when he was

alone. This leads to the clear implication that the marine police were engaging in their actions solely to discredit Rickard and to drive his potential customers away. Thus, something more than defamation is present in this case, and this addition amounts to a deprivation of Rickard's liberty and property interests in his good name and business reputation. See id. at 708-09, explaining the difference between Paul and Wisconsin v. Constantineau, 440 U.S. 433 (1971).

Other courts have recognized similar principles. Thus, in Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied sub nom. Rashkind v. Marrero, 450 U.S. 913 (1981), publicized charges that a business establishment contained stolen merchandise led to a finding by the court that tangible interests other than mere reputation had been infringed upon. In

both Gilmour v. New York State Racing & Wagering Board, supra, 405 F. Supp. at 461, and Catrone v. Massachusetts State Racing Commission, supra, 404 F. Supp. at 770, state actions were found to bring the plaintiffs into disrepute and thus effectively deny their property and liberty interests in their good names and business reputations.

Similarly, the court in Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 (2d Cir. 1980), determined that a "stigmatizing" liberty interest deprivation occurs when an individual's good name, reputation, honor, or integrity are called into question. In McKnight v. Southeastern Pennsylvania Transportation Authority, 583 F.2d 1229, 1236-37 (3d Cir. 1978), the court established the test as whether the challenge to good name or reputation damages future employment prospects.

Cf. Willens v. University of Massachusetts, 570 F.2d 403 (1st Cir. 1978).

Rickard submits that the actions of the marine police in questioning his credentials and registration in front of potential customers has had the effect of damaging his potential business and thus destroying his property and liberty interests in his good name and reputation. This Court should permit recovery for this damage.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to the Court of Appeals of New York.

Respectfully submitted,

Carl C. Banno
Banno, Landis & Pajion
146 Old Country Road
Mineola, New York 11501
516/746-5100

Counsel of Record
for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 1983, I forwarded by first class mail, postage prepaid, three copies of the foregoing Petition for Writ of Certiorari to:

Edward G. McCabe
County Attorney of Nassau County
1 West Street
Mineola, New York 11501

Carl C. Banno
Banno, Landis & Pajion
146 Old Country Road
Mineola, New York 11501
516/746-5100

Counsel of Record
for Petitioner